No. 3465

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY J. DILLON (formerly Mary J. Tynan) and THOMAS B. DILLON,
Plaintiffs in Error,

vs.

NORVENA LINEKER and FREDERICK V. LINEKER,
Defendants in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiffs in error respectfully petition the United States Circuit Court of Appeals of the Ninth Circuit, for a rehearing of the above entitled cause following the judgment and opinion of said court, filed therein on July 6, 1920, whereby the judgment of the United States District Court of the Northern District of California, Second Division, was

affirmed; and they respectfully ask and urge that further consideration should be given to certain propositions of law, and particularly to the first point urged and discussed in their brief as well as on the oral argument.

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1. EVEN IF THE OBLIGATION OF MRS. DILLON WAS SPECIAL, THE QUESTION OF THE TRUE MEASURE OF DAMAGES REMAINS.

The plaintiffs in error have heretofore argued that, taking the allegations of the complaint at face value, they did not show any greater amount to be in controversy than the McColgan debt alleged to be $2850.00, and that the verdict and judgment for the greater amount was unsupported by the complaint. In the opinion it is conceded that, where a contract to pay a specific sum of money is broken, the damages are measured by the sum stipulated. But the case at bar is sought to be distinguished under a principle stated in 17 C. J., 863,

> "That where the obligation to pay money is special and has reference to objects other than the mere discharge of a debt", "the special damages may be recovered according to the actual injury".

The term "special contract" is not to be deemed as embracing all contracts other than mere promissory notes; strictly speaking, such a contract is one containing provisions not commonly found in a contract of the same class or nature. The contract in

the case at bar is not a special contract within such a definition, for it contains no particular provision not found in all agreements to discharge mortgage debts. It does not contain intricate provisions such as, for example, were contained in the contract construed in Bixby-Thiesen Co. v. Evans, cited in the opinion.

Moreover an action upon an obligation containing promises that may be said to be special, nevertheless is governed by legal rules as to measure of damages. It is not to be considered that the amount of damages is an open question, as in an action for tort. Be the agreement ever so special, the question of the true measure of damages for the particular breach still remains.

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2. THE TRUE RULE OF DAMAGES FOR THE ALLEGED BREACH OF MRS. DILLON'S OBLIGATION IS SET FORTH IN THE CASE OF LOWE v. TURPIE, CITED IN OUR OPENING BRIEF.

The genesis of the statement quoted from Corpus Juris is easily traced. The statement is found in the Alabama case cited, and from that it may be traced back to Section 77 of Sutherland on Damages. But the statement made in Sutherland is merely the preliminary statement of the general rule to which a qualification is conceded as applying to a case like the one at bar, for the author after stating the rule, as quoted from Corpus Juris, in the opinion, continues in the same section to say:

> "Where one person furnishes money to another to discharge an encumbrance upon the land of the person furnishing the money, and the person undertaking to discharge the encumbrance neglects to do it, and the land is lost to the owner by reason of the encumbrance, the measure of damages may be the money furnished, with the interest, or the value of the land lost, according to circumstances. If the landowner has knowledge of the agent's failure in *time to redeem the land himself,* his damages will be the *money furnished, with interest.* But if the landowner justly relies upon his agent to whom he has furnished money to discharge the encumbrance, and the land is lost *without his knowledge,* and solely through the fault of the agent, the latter will be liable for the value of the land at the time it was lost."

The authority relied upon in the opinion rests ultimately upon Section 77 of Sutherland's work from which the above quoted excerpt is taken. And this excerpt is quoted, and the qualification therein indicated is applied, in the important case of Lowe v. Turpie, 44 N. E. 25, upon which we relied in our opening brief. It is further important to note that in the recent edition of Sutherland's work, both the cases of Lowe v. Turpie and Blood v. Wilkins, upon which we rely, are cited with approval in this very Section 77, and the qualifications indicated in these cases are made a portion of the text. Again we say we are justified in concluding that the law is truly stated in these two cases, and that they declare the true rule of damages in the case of an obligation of the character sued upon

her. The opinion does not note or discuss these cases.

Tested by the declarations in Lowe v. Turpie and Blood v. Wilkins, it is apparent that the complaint at bar is not sufficient to sustain a judgment for any more than the amount of the McColgan debt.

It does not appear that Svensen did not have knowledge in ample time to enable her to raise the money and prevent the sale of her property. It does not appear that the trustee's sale was speeded; in fact, the reverse appears. And no just reason whatever appears from the complaint why the small sum of the debt could not have been borrowed on property of the value stated, in spite of the existence of the outstanding life estate. We may note, that if the latter fact has any bearing, it would be important to show by the allegations of the complaint that the life estate had not fallen in at the time the property was taken for the debt; it appears that it fell in on August, 1916; the pleading does not show but that the sale was at a later date.

As these are material questions, the defendants in error must be deemed to have stated their case as favorably to themselves as the facts will warrant, and therefore it must be held that the trustee's sale was subsequent to the termination of the life estate, and that Svensen knew of an impending trustee's sale in good time and could have borrowed the money elsewhere on the credit of this valuable

property, even if she had no other assets. And the circumstance must not be ignored, that Mrs. Dillon, if she made the contract at all, breached it by failing to pay the McColgan debt within a reasonable time after April, 1911, and Svensen could have pursued her for the amount of that debt in the same manner she is now doing, and having recovered the money prevented the sale of her much more valuable property.

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3. EVEN IF THE ALLEGATIONS OF THE COMPLAINT COULD BE CONSTRUED SO AS TO SHOW AN AMOUNT IN CONTROVERSY IN EXCESS OF THE JURISDICTIONAL AMOUNT, NEVERTHELESS THEY FALL FAR SHORT OF JUSTIFYING THE MUCH LARGER SUM AWARDED BY THE VERDICT AND JUDGMENT.

The opinion makes the point, that Mrs. Dillon's promise to pay the McColgan debt in April, 1911, must be held to embrace not only the principal of the McColgan debt but also the accrued interest. It is true that if the interest be computed at the legal rate up to that time, the amount of principal and interest would have slightly exceeded $3000.00. But the complaint does not show that any particular amount of interest had accrued and *was unpaid* at the time of making the promise *non constat* but that a portion or all of such interest had been paid.

But be that as it may, such an assumption or such a construction of the complaint would only result in the fact that the complaint showed a liability for a debt slightly in excess of $3000.00, together with

legal interest thereon to date; but that sum would be many thousands of dollars less than the amount awarded. The failure of the complaint to state facts to support the full amount of the judgment is just as important as the failure to state facts showing the jurisdictional amount to be in controversy. The plaintiffs in error are entitled on this writ of error to have relief from such excessive verdict and judgment.

New Orleans Ins. Assn. v. Piaggio, 83 U. S. 378; 21 L. ed. 358;

World's Columbian Exposition v. Republic, 91 Fed. 64, 76;

Vance v. W. A. Vandercook Co., 170 U. S. 468; 42 L. ed. 1111.

Accordingly we have shown that the authority of the case of Lowe v. Turpie, supra, is in no respect weakened or overthrown by any authority cited in the opinion, but that in fact it is recognized and approved by Mr. Sutherland as a qualification of the very language reproduced in the opinion. And we think it must be clear that, tested by the principles of the case of Lowe v. Turpie, the complaint fails to state any facts sufficient to show that any damages claimed to have been suffered by Svensen over and above the amount of the McColgan debt, was any proximate consequence of anything that Mrs. Dillon did or left undone.

Accordingly I urge that a rehearing of the said cause be granted to the end that the court may give further consideration to the points above discussed

and the bearing thereon of the well considered authorities heretofore cited in support.

Dated, San Francisco,
August 2, 1920.

Respectfully submitted,
SAMUEL M. SHORTRIDGE,
Attorney for Plaintiffs in Error and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
August 2, 1920.

SAMUEL M. SHORTRIDGE,
Counsel for Plaintiffs in Error and Petitioners.